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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-27.

ABRAHAM GRUNIN,

Petitioner,

v.

INTERNATIONAL HOUSE OF PANCAKES, a Division of INTERNATIONAL INDUSTRIES, INC. and FRANCHISEE CLASS and SUB-CLASS MEMBERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT FRANCHISEE CLASS AND SUB-CLASS MEMBERS IN OPPOSITION.

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INTERNATIONAL HOUSE OF PANCAKES, A DIVISION OF INTERNATIONAL INDUSTRIES, INC. AND FRANCHISEE CLASS AND SUB-CLASS MEMBERS,

Respondents.

—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

—

BRIEF FOR RESPONDENT FRANCHISEE CLASS AND SUB-CLASS MEMBERS IN OPPOSITION.

———

OPINIONS BELOW.

The citation to the Opinion of the United States Court of Appeals for the Eighth Circuit, to which this Petition is directed, is adequately set forth in the Petition (Pet. 2). It is printed in the Appendix to the Petition (Pet. A-1 to A-26). The judgment of the District Court approving the Settlement Agreement which was appealed to the Court of Appeals was without Opinion and not reported. It is printed in the Appendix to the Petition (Pet. A-30 to A-38). The Order awarding attorneys' fees in the aggregate and the fund for reimbursement of costs is without

opinion and is not officially reported (R. A. 732, 733). It is printed in the Supplemental Appendix attached to this brief (A-47 to A-48). The Order of the District Court allocating fees among the various attorneys for the class and for individual franchisees is not officially reported (R. A. 1316-1324). It is printed in the Supplemental Appendix to this brief (A-49 to A-57).

The prior Opinion of the United States Court of Appeals for the Eighth Circuit and the Opinion of the United States District Court concerning the prior proposed settlement in this litigation are adequately cited but inaccurately characterized in the Petition (Pet. 2). The earlier settlement was not almost identical to the settlement here under review.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

QUESTIONS PRESENTED.

The Petitioner has submitted a list of five questions presented for review (Pet. 2, 3). Regrettably, the questions, as presented, distort the decision of the Court below, raise issues never presented to that Court or to the District Court, and inaccurately represent certain facts of record, all of which will become apparent in subsequent portions of this brief.

The decision of the Court below presents the following questions:

1. Whether the Court of Appeals erred in concluding that the timing, content and manner of transmission of notice from the District Court of a proposed settlement in class litigation and hearing thereon to Class and Sub-Class Members did not violate the requirements of Rule 23 and the dictates of due process.

2. Whether the Court of Appeals erred in concluding that the District Court did not abuse its discretion in determining that the proposed settlement in this class litigation was fair, reasonable and adequate, in approving the proposed settlement and in entering judgment thereon.

STATEMENT OF THE CASE.

Petitioner, a current franchise operator of Respondent, International House of Pancakes, a Division of International Industries, Inc. (hereinafter "IHOP"), and a member of the current franchisee class in the instant litigation, is the sole objector to a settlement negotiated with IHOP, on behalf of the 310 members of the class of current franchisees and subclass of former franchisees. Because of Petitioner's objection, the members of the class and subclass, and also other IHOP franchisees who are eligible to re-enter the class, have been deprived of the substantial benefits of the settlement for more than 1½ years. This brief is submitted in behalf of the members of the class and subclass, Respondents herein. It is understood that Respondent IHOP will similarly oppose the Petition.

As a result of certain inaccuracies, omissions, and improper inferences contained in Petitioner's Statement of Facts, Respondent finds it necessary to make a brief additional statement.

Subsequent to the transfer to the United States District Court for the Western District of Missouri by the Judicial Panel on Multidistrict Litigation of nine pending actions by franchisees and former franchisees of IHOP (*In Re: International House of Pancakes Litigation*, 331 F. Supp. 566), the District Court ordered that these actions be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Court's Order, dated October 26, 1971, certified a class composed of current franchisees of IHOP and a subclass composed of former franchisees (R. A. 125-127). Notice of the action was mailed to the class of current franchisees November 19, 1971 (Docket Entries pg. 9) and to the subclass of former franchisees February 24, 1972 (Docket Entries pg. 13).

The Complaints in these cases sought treble damages, injunctive relief and attorneys' fees from IHOP for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2 and Section 3 of the Clayton Act, 15 U. S. C. § 14. As the case developed, counsel focused primarily on the alleged Sherman 1 "tying" of necessary goods and services to the IHOP trademark.

Following extensive discovery (R. A. 283) and intensive negotiations (R. A. 275-280, 1071, 1072), the parties entered into the proposed Settlement Agreement dated March 19, 1973 (R. A. 292-395). Pursuant to Order of the District Court (R. A. 128), notice of hearing on the proposed settlement was mailed to the members of the class of current franchisees and to the members of the subclass of former franchisees on April 24, 1973 (R. A. 129-136). Hearing was held on June 1 and 2, 1973. Numerous objectors were present at the hearings including Petitioner in person and by counsel. By Order dated July 12, 1973, the District Court disapproved the proposed settlement primarily because there was no relief granted in the area of the equipment leases. That Order was summarily affirmed by the Court of Appeals for the Eighth Circuit on September 26, 1973, and reaffirmed in an Order dated November 2, 1973 (A-39 to A-41).

Further settlement negotiations were held culminating in a proposed Settlement Agreement dated November 7, 1973 which provided substantial beneficial revisions which met the objections of the District Court and the Court of Appeals in the first settlement. Therefore, contrary to petitioner's statement there was a substantial difference between the first and second settlement (R. A. 438-556).

A joint Motion for approval of that settlement was filed November 8, 1973 (R. A. 557, 558) and on that date, the District Court issued an Order and a Pretrial Order

approving notices to the class and subclass members of a hearing to be held on November 28, 1973 (R. A. 559-562). The notices were mailed on November 9, 1973 (R. A. 569, 573). Hearing was held November 28 and 29, 1973. Again, Petitioner appeared in person and by counsel as did many of those objectors who had appeared at the June hearing. At this hearing only Petitioner indicated objection to the proposed settlement. Petitioner did not state the reasons therefore nor did he challenge in any respect the notice of hearing or ask for a continuance of the hearing. Petitioner's counsel cross-examined witnesses who testified in support of the settlement and introduced two inconsequential exhibits (R. A. 1081-1083, 1312, 1314). Petitioner produced no witnesses of his own. At the conclusion of the hearing, the Court stated from the bench, it would enter an Order approving the settlement that day (R. A. 1086). The judgment was so entered (A-30 to A-38).

Immediately following hearing on the proposed settlement, the District Court began an evidentiary hearing on the fee petitions of the attorneys for the class and the individual franchisees. This hearing continued through November 30, 1973. Counsel for Petitioner filed a fee application and testified at the hearing (R. A. 706-709, 1242-1244).

By Order dated December 6, 1973, the District Court awarded $1,250,000.00 in the aggregate for attorneys' fees to counsel representing the class and certain counsel representing individual franchisees, stating that the allocation of fees among counsel would be subject to further Order of the Court (A-47). Subsequently, on February 1, 1974, the District Court entered an Order allocating the attorneys' fees among the various counsel (A-49 to A-57).

ARGUMENT.

The Decision Below Was Correct and Presents No Important Federal Question.

Stripped of all the Petition's inaccuracies, irrelevancies, diatribes and extra record speculation, Petitioner is really seeking to have this Court review the exercise of discretion by the District Court, which exercise has been reviewed and affirmed by the Court of Appeals in two separate areas where both Courts applied well-established principles of law:

1. The adequacy of notice to class members of hearing on a proposed settlement of class litigation; and

2. The fairness, reasonableness and adequacy of the settlement itself.

Viewed in proper context, it becomes abundantly clear that Petitioner seeks to involve this Court in a detailed review of factual issues which involve neither important federal questions nor conflicts among the circuits. There is no dispute with regard to the applicable principles of law. The decision of the Court of Appeals was eminently correct, fully in accord with all of the applicable precedents, and raises no issues warranting review by this Court.

A. The Decision of the Court of Appeals Applies Established Principles Governing Notice to Class Members and Raises No Question Justifying Issuance of a Writ of Certiorari.

Petitioner asserts that the notices with respect to the proposed settlement were in direct violation of due process

of law and Rule 23 of the Federal Rules of Civil Procedure in that (1) the time allowed between the mailing of the notices and the date of the hearing (19 days) was too short; (2) the contents of the notices were deficient in that they contained misrepresentations of fact, misleading constructions of contractual provisions and self-serving legal conclusions; and (3) the means of transmittal of the notices were not reasonably designed to reach all class members.

Most significant with regard to these contentions is that Petitioner appeared at the November 28th hearing in person and through counsel. At that time, there was expressed no objection with regard to the timing, content, or manner of transmittal of the notices, nor was a continuance of the hearing requested. As the Court of Appeals very appropriately pointed out:

> "If counsel had brought these objections to the attention of the Court at that time or had sought a continuance, the expressed need for appellate relief on these grounds might well have been eliminated." (A-12).

This Court long ago held that objections on appeal as to notice, when appearance was made in the trial court and no objections raised therein as to notice, were not well taken. *Carroll v. Dorsey,* 20 Howard 204, 15 L. Ed. 803 (1858); *Chaffee v. Hayward,* 20 Howard 208, 15 L. Ed. 804 (1858); *Johnson v. Waters,* 111 U. S. 640, 673, 4 S. Ct. 619, 637 (1884). The words of Chief Justice Taney in the *Chaffee* decision are particularly appropriate:

> "But if the defendant does not, by motion at the first term, apprise him of the irregularity of his proceeding in this respect, and of his intention to take advantage of it, the plaintiff is put off his guard by the defendant's appearance; and if motion is permitted at the second term, he will be delayed an entire year in the prosecution of his suit, whenever it is in the interest of a defendant in error to delay and harass his adversary."

Petitioner should not be permitted to turn an afterthought into an unfair burden and further delay which respondents, constituting all of the subclass and all other members of the class herein, must bear.

In order to demonstrate the fallacy of Petitioner's contentions with regard to the timing of the notice, it is necessary to review the factual circumstances surrounding the mailing of the notice, just as did the Court of Appeals. In particular, Petitioner has inaccurately represented that there were only nine (9) days from the mailing of notice for a class member to object to the proposed class settlement (Pet. 2). There were, in fact, nineteen (19) days. The Notices were mailed November 9, 1973 and the hearing was held November 28, 1973.

Petitioner agrees that the Notices were mailed November 9, 1973 and the hearing held November 28, 1973. Petitioner cites the District Court's Pretrial Order stating that class members who desired to object to the settlement and have an attorney represent him were to have that attorney file a written Entry of Appearance with the Court on or before Friday, November 23, 1973 (R. A. 560-562). Petitioner argues that between November 9, 1973 and November 23, 1973 were two weekends and one holiday thereby reducing the period to 9 days. However, the November 23, 1973 appearance requirement of the District Court was not enforced. Petitioner's attorney himself filed an Entry of Appearance, dated November 27, 1973, (R. A. 577) on November 28, 1973, the day the hearing began (R. A. 7). Petitioner's counsel was permitted to appear

at the hearing to present witnesses and offer argument as he desired. In fact, Petitioner's counsel participated in the hearing. Thus, contrary to Petitioner's assertions, there were, in fact, 19 days within which to react to the Notice.

In addition, no review of the "due process" elements of the notice would be complete without considering the abortive June 1st settlement proceedings. Prior to that proceeding notice had been mailed to the class and subclass members on April 24, 1973 (R. A. 135-136). The notice was accompanied by a complete copy of the Settlement Agreement and a copy of the numerous revisions to the franchise agreements, which had been negotiated on behalf of the class members (R. A. 135-136). At the hearing on June 1st and 2nd numerous objectors appeared, represented by counsel, and vigorously asserted their position. Among those objectors were Petitioner and his counsel. Subsequent to the Court's disapproval of that settlement on July 12, 1973 (A-42 to A-46), class counsel kept advised those counsel who had appeared at the June hearings of the progress of negotiations (R. A. 1340-1347).

The November 9th notice with regard to the November hearing did not include a copy of the Settlement Agreement or the proposed franchise agreement amendments. This was unnecessary. The notice advised that: "the amendments to the franchise documents previously embodied in the earlier settlement proposal have all been retained in the new Settlement Agreement. In addition thereto, a substantial number of further amendments, of substantial monetary value to the franchisees, are presently provided." (R. A. 566). There was in the notice a summary of the additional amendments along with the very significant portions of the Settlement Agreement relating to options on the equipment leases (R. A. 563-569) which were entirely new and not embodied in the previous Settlement Agreement. These were the benefits which met the objections to the first settlement of the Courts below. Thus, counsel for the objectors, including Petitioner, were kept fully advised of all events and developments as they occurred in the negotiations from June 1, 1973 through the date of the hearing. Viewed in this context, it is inconceivable that the Petitioner could argue that he had insufficient time and/or information to prepare for the November hearing.

Petitioner places substantial reliance upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652 (1950) and *Greenfield v. Villager Industries*, 483 F. 2d 824 (3rd Cir. 1973). In both cases, different from the case at bar, objection was made with regard to the alleged failure of the notice to meet due process requirements at the trial court level. In the *Mullane* case, this Court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted.)
>
> "The Notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean* (234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363) and it must afford a reasonable time for those interested to make their appearance. (Citations omitted.)
>
> "But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met and constitutional requirements are satisfied." (pp. 314, 315).

The Court of Appeals for the Third Circuit in *Villager, supra,* applied these principles and found the notice in violation of the due process requirements. The Court of Appeals for the Eighth Circuit in the case *sub judice* applied the same principles to the three-pronged attack asserted by Petitioner upon the Notice (timeliness, content and transmission) and found, in effect, that "with due regard for the practicalities and peculiarities of the case" the notice met the requirements of due process and Rule 23(e) of the Federal Rules of Civil Procedure. Rather than adopt a "continuing notice" theory as Petitioner suggests (Pet. 10), the Court below viewed the timing and content of the notice in light of all the surrounding circumstances.

The attack by Petitioner on the fairness or content of the notice seems to be over the choice of language or a semantic exercise to determine that alternative descriptions or words or more detail was desirable under the circumstances and, in fact, was required by the standards of due process. Respondents meet such contentions by reference to a number of cases where less than complete detail has been provided and approved by the courts in complex class action matters. *United Founders Life Ins. Co. v. Consumers National Life Insurance Co.*, 447 F. 2d 647, 654 (7th Cir. 1971); *Levin v. Mississippi River Corp.*, 59 F. R. D. 353, 372-373 (S. D. N. Y. 1973) affirmed *sub nom., Wesson v. Mississippi River Corp.*, 486 F. 2d 1398 (2nd Cir. 1973) *cert. den.*, 414 U. S. 1112 (1973); *Philadelphia Housing Auth. v. American R. & S. Sanitary Corp.*, 323 F. Supp. 364 (E. D. Pa. 1970); and *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S. D. N. Y. 1970) affirmed 440 F. 2d 1079 (2nd Cir. 1971) *cert. den. sub nom., Cotler Drugs, Inc. v. Chas. Pfizer & Co., Inc.*, 404 U. S. 871, 92 S. Ct. 81 (1971).

The notices of the proposed settlement and the hearing, were modeled upon and adapted from the forms of such notices approved and recommended by the Board of Editors of the *Manual for Complex Litigation* as amended to January 1, 1973. The forms of notice approved and recommended in the *Manual* are, in turn, those actually used in connection with the class action settlement in the Antibiotic Drug cases, *West Virginia v. Chas. Pfizer & Co., Inc., supra.* Rule 23(e) of the Federal Rules of Civil Procedure, imposes no specific requirements as to either the timing or the form of the requisite notice but provides simply that notice of the proposed settlement shall be given "in such manner as the Court directs". A determination by the District Court with respect to the adequacy of the notice, may, of course, be overturned upon Appeal only upon a clear showing of abuse of that "virtually complete discretion". If sufficient time is allowed for objectors formally to present their objections, and so long as the notice fairly describes the basic terms of the settlement, and the options open to class members, "with a due regard to the practicalities and peculiarities of the case," the requirements of Rule 23(e) and the demands of due process have been fairly satisfied. *Air Lines Stewards v. American Airlines, Inc.*, 455 F. 2d 101, 108 (7th Cir. 1972). The above-stated Rules with respect to notice in class action cases were scrupulously followed by counsel for Respondents herein and judicially determined to be fair, reasonable and within the bounds of due process of law by the District Court and the Court of Appeals.

Petitioner has chosen to attack the method of transmittal of the notice, i.e., mailed notice to last known address of all class members, arguing that such notice in reality amounted to a mere gesture on the part of the Respondents. However, this is the very type of notice

suggested by the Court in *Mullane v. Central Hanover Bank & Trust Company, supra* and, more recently, by the Court in *Eisen v. Carlisle & Jacquelin*, 417 U. S. 134, 94 S. Ct. 2140 (1974). The Petitioner neither disputes that the mailings were made to the last known addresses of class and subclass members, nor does he suggest any alternative method of notice which would be more reasonable and probable of success. The facts here dictate against publication because of the (1) relatively few members of the class and subclass, (2) widely scattered last known addresses from coast to coast of class and subclass members, (3) inability to determine any special characteristics of the class as a whole other than their common involvement in the franchise restaurant business at one time, and, (4) the high mobility of persons in this country.

The Petitioner cites what he terms the "monitoring provisions" in *Lamb v. United Security Company*, 59 F. R. D. 25 (S. D. Iowa 1972). That case was a shareholder derivative action where original notice to the class to determine participation was required by Rule 23(c)(2) of the Federal Rules of Civil Procedure. The District Court directed notice by direct mail, to the last known addresses of the class members. The Court further expressed a desire to examine the results of the notice actually sent before deciding whether additional kinds of notice were required. The *Lamb* Court citing the *Mullane* decision held that the dictates of due process required that the means to transmit notice "must not be less likely to inform than other feasible substitutes" (page 42). Here, as has been pointed out, the only possible alternative would be publication but the chance of such publication reaching a significant number of class members not reached by mail would be infinitesimal in view of the circumstances and the nature of the class.

The Constitution requires fair play in the dissemination of letters to persons whose whereabouts are unknown but does not require absolute perfection. Notice required in this case by Rule 23(e) of the Federal Rules of Civil Procedure is that which is directed by the District Court and includes the discretionary right to pick among alternatives as long as the notice is reasonably and fairly calculated to reach class members.

Whether the notice of settlement was timely, sufficient or reasonably designed to locate class members is a question, the resolution of which must turn upon the particular facts and circumstances of the individual case, having due regard to the fact that both the timing and the content, as well as the manner of delivery of such notices are matters as to which the District Court has very broad discretionary authority, *West Virginia v. Chas. Pfizer & Co., supra; Feder v. Harrington*, 58 F. R. D. 171 (S. D. N. Y. 1972). The particular facts and circumstances of this case clearly demonstrate that the District Court did not abuse its discretion in establishing the timing, form, content or method of delivery of the notice ordered by it and the Court of Appeals was correct in affirming that determination. The foregoing issues present no important federal questions and do not represent any conflict among the circuits. They represent solely, the application of established rules of law to a specific factual situation and do not warrant the granting of the instant Petition.

B. The Court of Appeals Correctly Applied Established Standards of Review in Affirming the District Court's Approval of the Class Action Settlement.

The remaining points raised by Petitioner are considered in this section of Respondents' Brief as each of

them relates to the standard of review an appellate court must apply to the review of a judicially approved class action settlement.

The standard of review of class action settlements is well-established and consistent throughout the various Circuits, that an appellate court should intervene only when the objector has clearly shown the District Court has abused its discretion. *City of Detroit v. Grinnell Corporation*, 495 F. 2d 448 (2d Cir. 1974); *Newman v. Stein*, 464 F. 2d 689 (2d Cir. 1972); *State of West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079 (2d Cir. 1971); *cert. denied*, 404 U. S. 871 (1971); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F. 2d 30 (3rd Cir. 1971); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F. 2d 647 (7th Cir. 1971); *Young v. Katz*, 447 F. 2d 431 (5th Cir. 1971).

The abuse of discretion test also has been applied to settlements in shareholder derivative suits and bankruptcy reorganization proceedings. See *Norman v. McKee*, 431 F. 2d 769 (9th Cir. 1970), *cert. denied*, 401 U. S. 912 (1971); *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d 567 (5th Cir. 1960); *Masterson v. Pergament*, 203 F. 2d 315 (6th Cir. 1953) *cert. denied*, 346 U. S. 832 (1953); *Connecticut Ry. & Lighting Co. v. New York, N. H. & H. R. Co.*, 190 F. 2d 305 (2d Cir. 1951); *Upson v. Otis*, 155 F. 2d 606 (2d Cir. 1946); *Cohen v. Young*, 127 F. 2d 721 (6th Cir. 1942), *cert. denied* 321 U. S. 778 (1944); *In re Prudence Co.*, 98 F. 2d 559 (2d Cir. 1938).

The strong public policy in favor of settlements requires that opposition to them should be made difficult, especially at the appellate level. See *Newman v. Stein*, 464 F. 2d 689, 692 n. 7 (2d Cir. 1972); *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F. 2d 770, 773 (2d Cir. 1972) (dictum). As stated by

the Fifth Circuit in *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960): "[T]he very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of power to compromise. This is a recognition of the policy of law generally to encourage settlements." Accord, *Pfizer, Inc. v. Lord*, 456 F. 2d 532 (8th Cir. 1972), *cert. den.*, 406 U. S. 976. See also *Williams v. First Nat. Bank of Pauls Valley*, 216 U. S. 582 (1909); Haudek, The Settlement and Dismissal of Stockholders' Actions—Part II, 23 Sw. L. J. 765, 793 (1969).

The Petitioner grossly misconceives the function of this Court, the Court of Appeals, the District Court and the nature of the proceedings from which this appeal was taken. Petitioner views these proceedings as in the nature of an appeal from the granting of a motion for summary judgment. This is best illustrated by the statements of Petitioner's Counsel in open Court at a hearing on January 31, 1974 (subsequent to the District Court's approval of the settlement), that:

> "Our appeal can decide without benefit of a formal trial that as a matter of law, that illegal ties, particularly with the equipment lease and the flour, and just two examples, are as a matter of law illegal ties under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, so that there would not have to be a trial of this matter ultimately." (R. A. 1361).

Counsel for Petitioner later in the same proceeding reasserted this proposition (R. A. 1363). This is not a summary judgment situation. The District Court has approved a compromise settlement of class litigation. It is clear beyond cavil that:

> "neither the trial court in approving the settlement nor this Court in reviewing the approval have the

> right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *City of Detroit, supra,* at p. 456.

As stated in *Young v. Katz,* 447 F. 2d 431, 433 (3d Cir. 1971):

> "In examining a proposed compromise for approval or disapproval • • • the court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial."

See also *West Virginia v. Chas. Pfizer & Co.,* 440 F. 2d 1079, 1086; *Florida Trailer and Equipment Co. v. Deal,* 284 F. 2d 567, 571 (5th Cir. 1960); *Percodoni v. Riker-Maxson Corp.,* 50 F. R. D. 473, 477 (S. D. N. Y. 1970), *aff'd per curiam sub nom. Farber v. Riker-Maxson Corp.,* 442 F. 2d 457 (2d Cir. 1971).

The testing standard of a Rule 23 compromise is set forth in *Young v. Katz,* 447 F. 2d 431, 433 (5th Cir. 1971), as:

> "The very purpose of compromise is to avoid the delay and expense of such a trial. The Court seeks only the answers to two inquiries: (a) whether there is any fraud or collusion in arriving at the compromise and (b) whether the compromise is fair, adequate and reasonable, or, to use an alternative formulation, whether it is for the best interests of (those) whose claims are being given up."

See also *State of West Virginia v. Chas. Pfizer and Co., supra* at p. 1085 where the Court of Appeals for the Second Circuit affirms the "fair, reasonable and adequate" standard for the evaluation of class action settlements.

There is no indication anywhere in the record, nor was it contended in the Court of Appeals that there was any fraud or collusion in arriving at the compromise (R. A. 275-280, 1071-1072).

In the case at bar, the District Court applied the applicable standards. The Court of Appeals reviewed this determination in accordance with the applicable precedents and found the District Court had not abused its discretion (A-12). There is no dispute among the parties with regard to the applicable standards and precedents. The only dispute is grounded upon the application of those standards and precedents to the facts of this case. Simply put, this does not present a federal question nor a conflict among the circuits justifying or even suggesting the issuance of a Writ of Certiorari.

The issues raised by Petitioner in his points 2 and 3 to the effect that the settlement agreement contains an illegal tying agreement in violation of Section 1 of the Sherman Antitrust Act (15 U. S. C. § 1) and that the Court of Appeals failed to consider whether "coercion" is an element of an illegal tying arrangement are issues that would have been resolved upon trial of the action. Whether the franchise agreements constituted illegal tying arrangements and whether coercion was an essential element in proof thereof were issues vigorously contested by counsel for the class and counsel for IHOP. The settlement represents a compromise of the positions of both sides to this litigation with respect to these issues. They are therefore no longer relevant and need not, indeed should not, be determined by the Courts. *City of Detroit v. Grinnell, supra* and *Young v. Katz, supra.* The arguments with respect to these issues are found in the brief of Respondent IHOP and of the Respondent class members filed with the Court of Appeals.

For his fourth point, Petitioner argues the settlement is improper because it modifies the contractual rights and obligations between the class members and IHOP. Again the Petitioner seeks to treat the appeal to the Court of

Appeals and the instant Petition as an appeal from a judgment issued by the Court in an adversary proceeding. This is not an appeal from the granting of a motion for summary judgment, from the entry of judgment on a motion to dismiss or from the entry of judgment following trial and verdict. This is an appeal from the judicial approval of a settlement, a settlement agreed to by counsel representing plaintiffs (class members) and counsel representing defendant (IHOP) in the District Court. Judgment approving the settlement was sought on the joint motion of counsel for plaintiffs and counsel for IHOP (R. A. 557, 558).

The cases cited by Petitioner, *Sylvan Birch Inc. v. Koch*, 140 F. 2d 852, 861 (8th Cir. 1944) and the others are inapposite as they involve judgments entered by the Courts in adversary proceedings which judgments provided relief not sought by the pleadings.

Furthermore, this argument was presented for the first time, in the Petition for Writ of Certiorari. Not having been raised, in the Courts below, it is not open to consideration at the Supreme Court. *Ellis v. Dixon*, 349 U. S. 458, 460, 75 S. Ct. 850 (1955).

Finally, point 5 of the Petition is bottomed upon a gross distortion of the settlement agreement as it relates to the award of attorneys fees to class counsel. The characterization of that fee provision is so inaccurate and misleading as to justify dismissal of the Petition under Supreme Court Rule 23.4.

The settlement agreement provided substantial monetary benefits to the class of current franchisees, estimated variously worth 12 to 20 million dollars. These benefits were in the form of reduction in the payments on equipment leases, etc. There was no cash fund payable to the class of current franchisees from which a fee could be awarded. There is a fund of $500,000 payable to the

subclass of former franchisees. It would obviously be unfair to the subclass to attempt to recover all the attorneys fees from that fund even if there were sufficient moneys in the fund to compensate class counsel.

Accordingly, it was agreed that such fees as awarded by the Court, would be paid by IHOP, to a ceiling of $1,250,000, that IHOP would not contest an award of attorneys fees not to exceed $1,250,000 and IHOP agreed that an award in an amount of $1,250,000 was just and reasonable (Settlement Agreement dated November 7, 1973, paragraph 10(b), R. A. 444). In addition, in view of IHOP's then financial condition, it was agreed that such fees as awarded by the Court would be paid over a period of four years (Settlement Agreement dated November 7, 1973, paragraph 10(b), R. A. 443, 445). Following approval of the settlement, the Court, in an Order filed December 6, 1973, found that $1,250,000 was a reasonable amount to be awarded and paid as counsel fees to counsel representing the class and counsel representing individual franchisees and so ordered, subject to a later order directing allocation among said attorneys (A-47 to A-48).

On February 1, 1974, the Court entered an Order, citing his knowledge of the efforts of the various attorneys participating in the litigation and, the evidence presented at the fee hearing on November 29 and 30, 1973, allocating the fees among various attorneys for the class and for individual franchisees (A-49 to A-57).

The foregoing clearly demonstrates that, counsel for the class and counsel for IHOP did not enter into "stipulations" (Pet. 26) . . . "that a specific amount will be paid as attorneys' fees;" (Pet. 27) and that Petitioner's statements to that effect are inaccurate and misleading. The fee was to be determined by the Court, with the provision (to the detriment of class counsel), that such fee could not exceed $1,250,000.

Stripped of its foundation, it becomes obvious there is no basis for Petitioner's Point 5.

This issue was not raised in the Courts below even though Petitioner was fully informed as to the provision of the settlement agreement pertaining to attorneys' fees. Indeed, Petitioner's counsel made application to the District Court for an award of attorneys' fees for his services relating to the settlement (R. A. 706-709). Furthermore, in the briefs to the Court of Appeals, counsel for Petitioner argued the District Court was in error in refusing to award him attorneys' fees. Never did Petitioner raise the issue presented by Point 5 of the Petition and he should be precluded from doing so now. *Ellis v. Dixon, supra.*

CONCLUSION.

The practice of this Court has been to grant writs of certiorari only in issues involving either important questions of federal law or a direct conflict in circuit court opinions. Respondents respectfully submit that neither is present in the instant Petition. The Court of Appeals simply applied fundamental and uncontested principles of law in affirming the approval of a class action settlement by the District Court. The Petition for Writ for Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

M.D. L. Docket No. 77

IN RE:
INTERNATIONAL HOUSE OF PANCAKES
FRANCHISE LITIGATION

Order.

The Court, at the conclusion of an extended evidentiary hearing on the award and allocation of attorneys' fees held in open court on November 29 and November 30, 1973, after taking testimony and being fully advised in the premises, hereby finds that the $1,250,000 provided by the Settlement Agreement herein for attorneys' fees is a reasonable amount to be awarded and paid in this litigation to counsel representing the class and certain counsel representing individual franchisees, and hereby ORDERS that:

1. All of the $1,250,000 provided by the Settlement Agreement herein is awarded as aggregate attorneys' fees subject to allocation by further order of the Court.

2. Defendant shall pay to the Clerk of this Court the initial payment of attorneys' fees of the amount of $250,000 as set forth in said Settlement Agreement and at the time provided in said Settlement Agreement.

3. The Clerk of this Court shall deposit the said sum of $250,000 in the registry of the Court, to be disbursed upon a further order of the Court after the Court's order allocating the attorneys' fees has been filed and the time for an appeal from such order has expired without an appeal having been taken by any interested party.

4. In the event an appeal is taken by any party from the order of the Court allocating attorneys' fees, the Court will, upon the application of any interested party, order all sums paid to the Clerk upon the judgment for attorneys' fees deposited in certificates of deposit at the maximum rate of interest for a period of three months, to be renewed for three-month terms until a final non-appealable judgment allocating the attorneys' fees is entered in this case.

5. The $75,000 provided for by the Settlement Agreement to cover the actual Court costs of this litigation and other related litigation expenses shall be paid to Sheridan Morgan, Esquire, and David Berger, Esquire, as co-lead counsel in this matter, at the time provided in said Settlement Agreement.

6. The aforesaid amount of costs shall be disbursed by said co-lead counsel first to satisfy actual Court costs and thereafter to satisfy expenses of the litigation incurred by class counsel, and, thereafter, to satisfy litigation expenses of other interested counsel with any remaining balance to be held by said co-lead counsel for further payment of costs herein.

WM. R. COLLINSON,
District Judge.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

—

M. D. L. Docket No. 77

—

IN RE:
INTERNATIONAL HOUSE OF PANCAKES
FRANCHISE LITIGATION

———

Order Awarding Attorney Fees.

The settlement this Court has approved is most unusual in this type of suit, an anti-trust class action. The principal class of operating franchisees (International House of Pancake Restaurants) receive no money by way of damages. (A sub-class of former franchisees receive $500,000, payable over a term of years.) The operating franchisees do receive extensive modifications in their long-term franchise and lease agreements with the defendant. The Court finds that the monetary value to the class members of these modifications will exceed $12,500,000.

The settlement contains the unusual provision that the defendant will pay attorney fees, as fixed by the Court, to a maximum amount of $1,250,000, payable over a five-year period.

This unusual settlement was occasioned by the defendant falling on hard times (during the three years progress of this litigation) and the economic interest of the plaintiff franchisees in keeping the defendant in business. The continued viability of this nationally known chain of I. H. O. P. was not only important to plaintiffs,

but the evidence disclosed that plaintiffs' long-term leases could be terminated by the individual owners of their buildings in the event defendant became bankrupt and all the fixtures in their stores were pledged to secure the defendant's huge load of debt.

A previous settlement agreement had been presented to the Court, and evidence was heard on that proposal on June 1st and 2nd, 1973. At that hearing some forty members of the class (out of approximately 150 operating franchisees and a like number of former franchisees) opposed the settlement, and the Court disapproved that proposed settlement. This settlement, based on a new approach, to satisfy the Court's objections, was then negotiated, and at the hearing on this settlement only one class member objected to its approval.

This Court now has the unenviable task of making a determination of the attorney's fees to be awarded to plaintiffs' attorneys on the basis of the reasonable value of their services to the class, with a ceiling on the total sum to be awarded. The attorneys have filed their claims with the Court, supported by affidavits, and a full evidentiary hearing was held on these claims.

The attorneys filing claims for allowances may be classified into three classes. First, the law firms of the two co-lead counsel appointed by the Court; second, other class counsel who worked on preparation of the case for trial and in the settlement negotiations; and, third, other attorneys, all of whom were employed by individual class members to oppose the first settlement proposal, and who entered the case for the first time at the hearing on June 1, 1973.

Mr. Sheridan Morgan, of Kansas City, and Mr. David Berger, of Philadelphia, were co-lead counsel. Mr. Morgan has filed a detailed, itemized statement of the

hours spent by himself and the members of his firm, and the hourly rates customarily charged. The fee requested is $750,000. The majority of the man power and administrative assistance for the extensive discovery in this case was furnished by this firm.

Mr. David Berger filed a lengthy factual affidavit of the services performed by himself and the members of his firm. The hours were not itemized, but the Court is well aware that Mr. Berger and one associate (three different associates at different times) worked actively on the case since its inception.

Mr. Harold Brown and Mr. Mark Klein, who were both original class counsel, have filed substantial claims. Mr. Klein's services were under the direction of Mr. Morgan, Mr. Klein having no previous anti-trust experience, and were in aid of both preparation of the case and settlement negotiations, including verifying financial data bearing on a possible settlement. The services of Mr. Harold Brown, on the other hand, according to his affidavit and testimony, consisted principally of conferring with Mr. Berger or his associates about strategy. Mr. Harold Brown did not participate in the mechanics of discovery, appear at any of the hearings on motions or at pretrial conferences, and appeared before this Court for the first time at the final hearing on the final settlement and award of attorney fees.

Mr. Robert M. Brown, another attorney for the class, has filed a substantial claim. Mr. Robert Brown's services were principally in cooperation with Mr. Morgan in both preparation of the case for trial and negotiating the settlement. He attended many pretrial conferences, took depositions, and made investigations on the west coast.

The remaining attorneys filing claims with the Court were each employed by one or more class members to oppose the first proposed settlement. They assert that

because the settlement was disapproved, and because the second approved settlement was more favorable to the members of the class, they are entitled to attorneys' fees for benefit to the class. It is also undisputed that some of these attorneys were consulted and gave opinions and advice on the drafting of the second settlement, but in their capacity of representing individuals as opposed to the entire class.

In passing, it is the Court's opinion that the question of whether any benefits resulted to the class from the disapproval of the first settlement is still an open question, and cannot be determined for at least five years. The majority of the class apparently was satisfied with the terms of the first settlement, at least, although invited, they lodged no protest. If the franchisor cannot survive financially under the terms of the second settlement, all stand the risk of losing their leases at locations where many operate very profitable businesses, and all will lose the advantages of operating under a nationally known name and trademark, a right which is presently valued at over $60,000 for each franchise. The Court is certainly not critical of the attorneys' actions in vigorously representing their individual clients and presenting their opposition to the settlement, but is expressing doubt of the validity of the assumption by these attorneys that since the second settlement satisfies their clients and increases *possible* financial benefits to all class members, it necessarily follows that the class members who were satisfied with the first settlement have been benefited. To express it tritely, "only time will tell."

This Court has taken the teachings of *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F. 2d 1045 (2d Cir. 1973), as the standards to be applied in this case. That case lays down eight matters to be taken into account in the allowance of attorneys' fees, which are: standing of

counsel at the bar, time and labor spent, complexity of the litigation, the amount recovered, the responsibility undertaken, the court's knowledge of the amount and quality of work done, what it would be reasonable for counsel to charge a victorious plaintiff, and whether or not counsel had the benefit of a prior decree in a government-brought case. In applying these standards the Court has also applied the teachings of the case of *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., et al.*, Nos. 72-1647 and 72-1648, Third Circuit Court of Appeals, dated October 31, 1973, which require the court to hold an evidentiary hearing on fee allowances and make a determination of the hours spent by the attorney on the litigation, the value of the attorney's time generally, the contingent nature of the attorney's fee and the quality of the attorney's work.

After hearing all the testimony on this case and reviewing the file, which illustrates to a considerable degree the quantity and quality of the work done, and taking into account the amount of the recovery, the difficulty of the case in view of some previous court decisions, and the high professional standing of the attorneys involved, the Court has made a determination that if a cash settlement of $12,500,000 had been obtained, the Court would have awarded total attorneys' fees in the neighborhood of $2,500,000. As pointed out above, the benefit to the class in this case is entirely contingent upon the success of the defendant corporation in overcoming its financial difficulties and staying out of bankruptcy court. But, likewise, any fee awarded by this Court is contingent upon the same considerations, because the settlement provides that the fee is payable over a five-year period and no interest is payable on the deferred portion. It is certainly not a violent assumption to believe that, if the fees awarded

here are paid in full because the company has survived the next five years, it is "over the hump" and that the class plaintiffs will receive the full benefits provided for in the settlement. Because the total fee allowance is limited to the agreed sum, it has been necessary to fix the fees of all the attorneys in proportion to the Court's determination of the proportion each attorney's services contributed to the final settlement of this lawsuit. The Court is well aware that this division will probably not compensate any lawyer for his customarily hourly charges for the time expended, without taking into account any additional sums due to the contingent nature of his fee.

The Court has also had to take a long look at the question of duplication of work. For example, by the very nature of the proceedings at the hearings on the first settlement, the attorneys employed by individual opponents of the settlement each had to brief the law on the standards to be applied and the procedures to be followed, and review a voluminous, unfamiliar file. There was undoubtedly a great deal of duplicative effort in the preparation of the individual client's protests. Some of the attorneys applying for allowances in this case had great expertise and years of experience in anti-trust litigation. Others frankly admitted that they had no expertise (but probably have gained a great deal during these proceedings). The Court has, of course, had to take into account that hours spent by an inexperienced lawyer may be far less productive than the same number of hours spent by an experienced attorney.

The Court believes that it is fundamental that the thorough, detailed, and competent preparation of this case by the plaintiffs for trial, coupled with the approach of a definite trial date, contributed more than any single factor to the settlement. The settlement negotiations themselves are, of course, important and the time spent by

counsel on them is entitled to compensation. Taking all these factors into account, and, after considering the problem from two completely divergent viewpoints, the Court has decided to, first, determine the allowances to the lawyers who were employed by individual clients to oppose the first settlement.

The case of *Alpine Pharmacy, Inc., supra,* at pages 1053-4 (docketed on certiorari as *Patlogan v. Dickstein,* Sup. Ct. Docket No. 73-562, 92773, *cert. denied* 12/10/73), holds that no allowance to attorneys who fall within this classification need be made. In fact, it would appear that the basis for an allowance in that case is much stronger than it is in the instant case because the benefits to the class from opposing the settlement by those private attorneys were definite and certain. However, the Court knows, and the record shows, that some of the attorneys who appeared in opposition to the first settlement spent a great deal of time in connection with the negotiation of the second settlement. The Court thinks that it is unquestionable that the services of these lawyers, although retained by private clients, contributed to some degree to the successful negotiation of the second settlement and that their overall services should be compensated in some degree from the attorneys' fee award in this case and the entire fee should not be borne by their individual clients.

The affidavits of Mr. William G. Springer, Mr. Paul William Garber and Mr. Julius A. Tracy clearly indicate that their services were on behalf of a single client each and did not contribute materially to either the disapproval of the first settlement or the negotiation of the second settlement.

Mr. Lance B. Johnson, who also represented a single member of the class, filed a detailed and itemized list of his services on behalf of his client. Part of this work was concerned with the first proposed settlement and part was

in connection with matters which were the sole concern of his individual client, but there were no services which contributed to the final settlement.

Mr. Granoff, Mr. Shapiro and Mr. Cohen each appeared in this matter in opposition to the first settlement and presented their clients' opposition and reasons therefor, most vigorously. Mr. Cohen also had some limited participation prior to this time. Thereafter they each were in contact with the class attorneys who were negotiating for the second settlement and their services unquestionably contributed to the successful culmination of those negotiations. Each, of course, was representing individual clients but the Court is satisfied that their efforts did contribute to the final settlement agreement and that part of the charges for their services should be allowed as attorneys' fees.

The last applicant in this class is Mr. Jay S. Fichtner, who represents one client. Mr. Fichtner was very active in opposing the first settlement and the second settlement. His client is the sole class member who registered any opposition to the second settlement and has appealed from the Court's order approving the second settlement. The Court is certainly not critical of any lawyer who is vigorously representing his client's wishes. But it appears that, if the second settlement is not fair, reasonable and adequate, as Mr. Fichtner *now* contends, he is most inconsistent in applying for a fee of $75,000 for assisting in securing a settlement he contends confers no substantial benefits on the class or subclass. The Court holds that his services for his client are not entitled to be compensated from the attorney fee.

The Court awards attorneys' fees to the attorneys in the above described class as follows:

Mitchell Shapiro	$10,000
Loeb Granoff	10,000
Barton P. Cohen	10,000

On the basis of both the quality and the quantity of the work done, the effectiveness of the services, and discounting for some obviously duplicative efforts, the Court has made the following determination of the proper awards for the remaining attorneys in this matter:

Sheridan Morgan, Donald H. Loudon, Harry A. Morris and Morris, Mitchell, Larson, King, Stamper & Bold, a Professional Corporation	$650,000
David Berger and David Berger, P. A.	325,000
Mark Klein	105,000
Robert M. Brown and Carroll, Burdick & McDonough	105,000
Harold Brown and Brown & Leighton	35,000

It Is Therefore, Ordered that judgment be entered in this cause awarding attorneys' fees to the named attorneys in accordance with the above opinion. Mr. Sheridan Morgan is directed to file a form of judgment in accordance with this order for the Court's signature.

William Collinson,
District Judge.